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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 306

306

LOUIS A. JOHNSON, Secretary of Defense of the United States, et al.,

Petitioners,

v.

HAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of FRANZ SIEBERT, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Court of Appeals (R. 53-62) is reported at 174 F. 2d 961. The opinion of the District Court (R. 16-17) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 15, 1949 (R. 63) and a petition for rehearing (R. 64-65) was denied on June 6, 1949 (R. 66). The petition for writ of certiorari was filed on September 1, 1949, and was granted on November 14, 1949 (R. 69). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

Constitutional Provision and Statute Involved

Article I, § 9, cl. 2 of the Constitution provides:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U. S. C. (1948 rev.) 2241 provides in pertinent parts:

> "§ 2241. *Power to grant writ.*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless:
>
> * * * * * * *
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations * * *."

Statement

The prisoners are German nationals who, during World War II, were engaged in admittedly legal activities on behalf of their native land in conjunction with one of its Allies. They are twenty-one civilians, two of whom were in the German Embassy and Consular Service in Japanese occupied China—two of whom were in the German Information Bureau, an agency of the German Embassy—one of whom was in the German News Agency, known as

"DNB"—and the remaining sixteen of whom were in an intelligence office known as "Bureau Ehrhardt" (R. 8).

Their activities were legally, and properly conducted within the rules of warfare in the cities of Shanghai, Canton and Peiping—all of which were in that part of China that was occupied by the armed forces of Japan (R. 3).

After the war between the United States and Japan came to an end on August 15, 1945, the prisoners were arrested, charged with violation of the laws of war, tried and convicted by an American Military Commission (R. 3-5). The gist of the allegations was that the prisoners had continued their activities on behalf of Japan after the surrender of Germany on May 8, 1945, and that the activities which had been legal prior to May 8, 1945, became illegal after that date by reason of the document signed by "Friedeburg", "Keitel", and "Stumpff" which purported to surrender "all forces on land, at sea, and in the air" who were on that date "under German control". In short, the prisoners were charged with having continued to fight on the side of one of their surrendered country's allies as did the Free French, Poles, Belgians, Dutch, Filipino guerrillas and others who have not been tried as war criminals, but who have been hailed as heroes for their patriotic constancy (R. 2-3, 18-33).

The charge, evidence, and proof show that prisoners were not under the "control" of the surrendering parties, but were at all times in Japanese-occupied territory. The charge does not allege that the prisoners were ordered to surrender, but on the contrary the charge (as implemented by a Bill of Particulars) alleges that they were ordered to "furnish aid and intelligence to the Japanese armed forces" (R. 25-33).

Although all hostilities had long since ceased, and there was neither military government or occupation nor a declaration of martial law in China, the prisoners were tried together in a common trial by an American military commission set up in a friendly sovereign state in violation of treaty and international law. The trial was conducted with-

out regard to the rules of evidence or the rights of an accused to a fair and impartial trial as guaranteed by treaty, by international law, and by the statutes and Constitution of the United States (R. 3-4, 34-40). The prisoners were sentenced to imprisonment for terms ranging from two years to life, and the sentences were confirmed and ordered executed, not by a field commander engaged in the prosecution of war, but by the Chief of a United States Army "Advisory Group", whose sole status in China was that of technical advisor to a friendly government (R. 6, 40-43).

The prisoners were shipped, after sentence, to Landsberg Prison in the American occupation zone in Germany, where they are now confined. They brought this petition for a writ of habeas corpus in the District Court of the United States for the District of Columbia, to test the validity of the trial and convictions. Their immediate custodian is subordinate to and answerable to your present petitioners. Unlike other applications for the writ that have recently been brought before American courts, there is not here involved any International Tribunal or Allied Military Government Tribunal. We have here (as in *Ex Parte Quirin*, 317 U. S. 1 (1942) and *In re Yamashita*, 327 U. S. 1 (1946) a purely American military commission set up under the purported authority of an agency of the United States alone.

The District Court (TAMM, J.) dismissed the petition for lack of jurisdiction and consequently did not reach the question whether the petition stated a cause of action for the relief sought (R. 16-17). Upon appeal, the United States Court of Appeals for the District of Columbia Circuit reversed Judge Tamm and held that the district court has jurisdiction to grant the writ, despite the fact of confinement outside the District, where personal jurisdiction is obtained within the District over persons who have directive power by line of authority over the jailer. The Court of Appeals remanded the case for further proceedings (R. 53-63).

Respondent then moved for rehearing, requesting the Court of Appeals to pass upon the merits of the petition (R. 64-65). This motion was denied (R. 66). The matter is before this Court by reason of a writ of certiorari granted November 14, 1949 (R. 69).

Question Presented

Does the United States District Court for the District of Columbia have jurisdiction to entertain a petition for a writ of habeas corpus brought on behalf of twenty-one German nationals who are confined in an American prison in the American occupied zone of a conquered country, to test the validity of such confinement pursuant to trial and conviction by an American military commission—where the petition names the responsible Government officials under whose authority the prisoners were tried, convicted, and are being confined and whose authority must be exercised if they are to be released, such named persons and their offices, records, and staffs being permanently located in the District of Columbia?

Summary of Argument

The purpose of this proceeding was twofold: to test the validity of the trial, conviction and confinement by the United States of the twenty-one German nationals in whose behalf it was brought; and to secure their release if such confinement is held to be unlawful. The respondent maintains that the United States Court of Appeals for the District of Columbia Circuit was correct in holding that the United States District Court for the District of Columbia has jurisdiction to entertain the petition for a writ of habeas corpus that named the responsible Government officials under whose authority the prisoners were tried, convicted and are now confined, and whose authority must be exercised if they are to be released.

Basically respondent believes the Court of Appeals was correct, because any other decision would result in an indefensible situation. It would make the exercise of fundamental rights depend on the accident of locus of incarceration. It would allow the Military effectively to destroy rights which this Court has affirmed to persons tried before an American military commission for purported violations of the laws of war—simply by strategic choice of a place of confinement.

The Government seeks to reverse the Court of Appeals. Specifically answering their argument, respondent contends:

I

A. The habeas corpus statute (28 U. S. C. §§ 2241-2255) is plenary and places no limitation on the writ. Section 2241 provides that "writs of habeas corpus may be granted by * * * the district courts * * * within their respective jurisdictions." In *Ahrens* v. *Clark*, 335 U. S. 188, this Court construed the statute, and particularly the phrase "within their respective jurisdictions", to enunciate the reasonable rule of venue that petitioners confined within the territorial jurisdiction of a district court are denied process within any other district. The Court specifically reserved the question herein posed, the remedy available to prisoners tried and confined by reason of American authority in an area beyond the territorial limits of any district court. The Court of Appeals, therefore, correctly ruled that *Ahrens* v. *Clark* did not foreclose district court jurisdiction in this case.

B. Congress did not intend to create a gap in the availability of the writ of habeas corpus. Legislative history indicates that in using the words "within their respective jurisdictions" the lawmakers were concerned with problems of jurisdiction *inter sese*. The aim of habeas corpus statutes taken as a whole was to enlarge, not to limit, the common law meaning of *habeas corpus*.

C. Nor do state laws and practices support the Government's contention. Problems of extraterritoriality are beyond the concept of the individual states. Furthermore, the two classical exceptions disprove the Government's claim that Congressmen must have assumed there was lack of power in the courts to entertain the petition of one confined beyond the territory. These exceptions are those involving the custody of children and the pre-*Ahrens* v. *Clark* cases involving District of Columbia penal institutions in Virginia.

D. The concept of "habeas corpus" had a common law history that encompasses the instant problem. English precedent indicates that the writ historically reached "to all dominions of the Crown", and there are a number of instances of writs being granted in English courts at the behest of prisoners who were beyond the territorial jurisdiction of the courts. In addition, however, American courts and statutes have extended the English common law concept of habeas corpus, and this Court has held that it is not "necessarily confined to the precise forms of that writ in vogue at the common law as in the English judicial system."

E. Section 4 of the habeas corpus statute specifically applies to the prisoners here. They are "citizens of a foreign state * * * domiciled in a foreign state * * * in custody * * * for acts done or omitted under alleged right, title, authority, privilege, protection or exemption claimed under the commission, order or sanction of a foreign state, or order thereof, the validity and effect whereof depend upon the law of nations." Although this statute was originally passed to assert federal dominance in a federal-state conflict of power, its wording indicates a purpose beyond its motivating cause—namely, to assure supremacy of the federal court in this type of matter by whatever authority it be challenged.

II

Interpretation of the habeas corpus statutes so as to deny jurisdiction to issue the writ in this case would constitute a suspension of the writ in violation of Article I, Section 9, of the Constitution. Whatever gap there may be in the statute, there is certainly none in the Constitution, which secures the privilege of the writ to all persons illegally confined by American authority. The draftsmen of the Constitution intended the scope of the writ to be co-extensive with the power of the Executive to restrain bodily liberty. Any limitation upon that scope based upon the locus of confinement would make the availability of the writ depend upon the whim of the jailer. Any limitation based upon the alienage of the person confined would have the effect of sanctioning unconstitutional and illegal detentions and would defeat expressed constitutional and statutory policies applicable to aliens as well as citizens.

III

The fact that the upholding of jurisdiction will place a burden of adjudication upon the District Court for the District of Columbia cannot afford a basis for denying jurisdiction. Even if it were true that the effect of an affirmance could be to flood the District Court with litigation, that circumstance would not justify the Court in shirking an obligation imposed upon it by the Constitution and Congress. This is particularly true where the cases pose fundamental questions and involve capital punishment or long prison sentences. In no event, however, could affirmance in this case have the effect predicted by the Government since the Allied Military Government cases, which represent the overwhelming preponderance of cases abroad, would not be affected. If the administrative burden should become great, however, the remedy would lie in a distribution of the petitions throughout the circuits pursuant to Congressional action.

IV

The petitioners, as superiors in the direct line of command over the Commandant of the prison, with admitted power to effectuate the release of the prisoners, are proper parties to whom the writ may be addressed. In view of the concession by the Government that the named officials have power to effectuate any order of the Court, the circumstance that they are not the actual jailers is irrelevant. It has never been the invariable rule that the writ must be directed against the immediate jailer. To deny relief to persons overseas because their immediate jailers are also overseas would reverse the entire history of the writ by denying it upon a trifling technicality.

ARGUMENT

I

The habeas corpus statute is plenary and places no limitation on the writ.

A. This Court has not interpreted the statute so as to limit the availability of the writ to test the legality of restraint of liberty by reason of purely American authority; it has only given guidance as to the proper forum for its exercise.

Respondent contends that the U. S. Court of Appeals for the District of Columbia Circuit was correct in its holding that the statute, 28 U. S. C. 2241, provides that the U. S. District Court for the District of Columbia has jurisdiction to entertain the petition for a writ of habeas corpus in the case at bar. The statute provides in pertinent part:

> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

The Government contends that the last four words quoted above postulate a requirement that he who petitions for the writ must be confined within the territorial boundaries of the particular judicial district involved,—that is, that the Court of Appeals was in error because the prisoners are not confined within the District of Columbia. The Government relies on *Ahrens* v. *Clark*, 335 U. S. 188.

In the *Ahrens* case, a group of German nationals confined on Ellis Island, New York, filed a petition for a writ of habeas corpus in the U. S. District Court for the District of Columbia, alleging that they were subject to the custody and control of the Attorney General. This Court held that the District Court for the District of Columbia was without jurisdiction to entertain the petition.

The essential facts of the *Ahrens* case, are thus quite different from those presented here. In the *Ahrens* case, the petitioners had an obvious remedy in the District Court for the Southern District of New York. The effect of the decision, therefore, was not to suspend the writ of habeas corpus, but simply to relegate the petitioners to a more convenient and expedient forum. In the case at bar, however, the respondents, although Federal prisoners, are not located in any territory specifically allotted to any District Court—although their jailers are.

The distinction between the two types of cases was recognized and expressly provided for by the Court in the *Ahrens* case (p. 192, footnote 4):

> "We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights. Cf. *Betz, Durant, Wills, Cutino, Walczak, McKinley, Murphy*, 329 U. S. 672."

It is thus apparent that this Court did not decide the question presented herein, but on the contrary, expressly reserved it. The cases cited at the end of the above statement are all cases where the petitioners were confined by the United States Army in Germany, and forwarded orig-

inal petitions for writs of habeas corpus directly to the Supreme Court. Although the writs were denied, the Court's per curiam notation indicated that the reason was "want of original jurisdiction." And significantly the following statement was appended:

> "Mr. Justice Black and Mr. Justice Rutledge are of the opinion that as in *Ex parte Hauk*, 231 U. S. 114 (see also *White* v. *Ragen*, 324 U. S. 760, 765) where this Court declined to entertain an application for relief by habeas corpus, the petition for habeas corpus should be denied without prejudice to it being filed in the appropriate District Court. See *Ex parte Endo*, 323 U. S. 283, 304-306.
>
> "Mr. Justice Murphy is of the view that this petition raises questions as to jurisdiction and proper procedure which should be heard and determined by this Court."

See also:

In re Bush, 336 U. S. 971.

The Government, however, relies on general language in the *Ahrens* decision which it claims indicates that presence of a petitioner within the territorial confines of the district court is an essential prerequisite of its *power* to act. It, therefore, becomes fruitful to examine subsequent explanatory language used by the author of the *Ahrens* opinion.

In his concurring opinion in *Hirota* v. *MacArthur*, 338 U. S. 197, at 201-202, Mr. Justice Douglas sheds further light on the disputed language:

> "* * * In *Ahrens* v. *Clark*, supra, we were dealing with the distribution of judicial power among the several District Courts. There was an explicit legislative history, indicating disapproval of a practice of moving prisoners from one district to another in order to grant them the hearings to which they are entitled. We held that the court at the place of confinement was

the court to which application must be made. But it does not follow that, where that place is not within the territorial jurisdiction of any District Court, judicial power to issue the writ is rendered impotent.

"* * * In *Ahrens* v. *Clark*, supra, denial of a remedy in one District Court was not a denial of a remedy in all of them. There was a District Court to which those petitioners could resort. * * *

* * * * * * *

"* * * The allocation of jurisdiction among the District Courts, recognized in *Ahrens* v. *Clark*, is a problem of judicial administration not a method of contracting the authority of the courts so as to delimit their power to issue the historic writ."

The practical wisdom of *Ahrens* v. *Clark* is clear. Any other result would tend to channel into the District of Columbia thousands of habeas corpus proceedings which could with equal fairness to the prisoner and greater dispatch and convenience be tried in the local district courts. But the extension of the decision to the case at bar would be unconscionable. It would deny the possibility of any judicial scrutiny of the administration of military justice if the prisoner is held abroad.

This Court held in *In re Yamashita*, 327 U. S. 1 (1946), and in *Ex parte Quirin*, 317 U. S. 1 (1942), that an accused enemy war criminal may come into the American Courts and challenge the fundamental constitution of the tribunal which tried him and the charge. Yamashita and Quirin got into Court without question because they were in prison on American soil. Is the accident of imprisonment abroad to defeat the day in court? Is the power to be placed in Army hands to determine, by the mere shifting of a prisoner from or to the United States, whether there is to be judicial scrutiny of its quasi-judicial acts?

Today the American forces are spread throughout the world and American military justice governs many millions, including vast numbers of Americans abroad as well as foreigners. *Ahrens* v. *Clark*, we submit, does not deny

these millions their day in court; it merely enunciates a reasonable rule of venue under the Judicial Code.

B. The language of the habeas corpus statute was not intended to create a gap in the availability of this fundamental writ.

Congressional enactments since the first habeas corpus statute was passed in 1789—specifically laws passed in 1833; 1842, 1863 and 1867, have steadily enlarged the scope of the writ. (See note in 18 Fed. 68.) The statute which included the controversial phrase: "within their respective jurisdictions" was enacted in 1867. The Government contends that Congress intended those words to bar the instant case.

Of course no Congressman in 1867 intended, by reason of adoption of that clause, to draw a distinction between the rights of a defeated enemy General tried for war crimes and incarcerated in Manila (*In re Yamashita*, 327 U. S. 1) and the respondents tried by an American tribunal in China and incarcerated in Germany. Considering the problems of 1867, it is clear, as the legislative history cited in *Ahrens v. Clark* demonstrates, that the phrase "within their respective jurisdictions" was adopted in order to make certain that, to paraphrase the words of one legislator, a district judge in Florida did not grant habeas corpus to persons confined in Vermont. Compare the discussion of the legislative history in Fairman, Some New Problems of the Constitution Following the Flag (1949) 1 Stanford L. Rev. 387, 634-639.[1] Congress was not considering the rights of persons outside the country, and its words demonstrate that it was only with problems among jurisdictions *inter sese* that it was concerned.

[1] Pursuant to exhaustive research on the legislative history of the 1867 statute, Fairman concludes (p. 639): "Congress had set out to make the writ of habeas corpus available in one more situation—not to legislate about the territorial reach of the courts or the judges. * * * And if the Court were so to apply its constructions as to place the writ beyond the reach of a military prisoner overseas, it would achieve precisely the result that Congress was unwilling to authorize. * * *"

If we are to examine the purpose of Congress, heed must be given not to these isolated words of jurisdiction, which were intended as a specific solution to a specific supposed problem, but to the whole body of habeas corpus statutes. "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion." Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 21.

The purpose of Congress has already been stated by this Court. Habeas corpus legislation, said Mr. Chief Justice Chase in *Ex parte McCardle*, 6 Wall. 318, 325-326, "is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and every judge every possible case of deprivation of liberty contrary to the National Constitution, treaties or law. It is impossible to widen this jurisdiction." And it is impossible to read 28 U. S. C. §§ 2241 *et seq.* without concluding as did Mr. Chief Justice Chase, that they are as comprehensive as possible and, as did the Court of Appeals, that they are "coextensive with executive power, at least in so far as prisoners in jail are concerned." Or, as one Congressman stated in proposing the statute which now contains the words "within their respective jurisdiction": "This bill has been introduced, the effect of which is to enlarge the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them." Cong. Globe, 39th Cong., 2d Sess. 730 (1867). And a reading of the history of continuous Congressional expansion of the writ, see, *e.g.*, *In re Neagle*, 135 U. S. 1; *Frank* v. *Magnum*, 237 U. S. 390; The Freedom Writ—the Expanding Use of Habeas Corpus (1948), 61 Harv. L. Rev. 657, carries one to the same conclusions.

It is true, as pointed out by the Government, that Section 16-801 of the District of Columbia Code by its terms limits jurisdiction to persons confined within the District. This is, however, an entirely independent statute applicable only to such persons, and no more in point here than it was in *Threats* v. *Clark*. The existence of that statute,

however, explains the decision in *McGowan* v. *Moody*, 22 App. D. C. 148 (1903). That case, which is cited with approval in the Government's brief, held that the District Court for the District of Columbia lacked power to issue the writ to the Secretary of the Navy with respect to an American sailor confined in jail by the Navy on the Island of Guam. The opinion of the Court of Appeals in that case discloses that the petitioner apparently relied on the District Code and never presented for the court's consideration the broad plenary language of the Judicial Code.

C. State laws and practices do not support the Government's contention.

The state and territorial legislation compiled and referred to by the Government is irrelevant. Not only do statutes of individual states have no authoritative bearing on this federal question, but by their very nature and definition the individual states do not normally face the problem of extraterritoriality herein posed.

(1) The two classical types of exception disprove the Government's point. The first has to do with cases involving the custody of children. Here the general rule is that confinement within the state is immaterial. The only requisite is that the person responsible for the custody be within the state. As stated by Judge Cooley in *Matter of Samuel W. Jackson*, 15 Mich. 417, 439-440:

> "The important fact to be observed in regard to the mode of procedure upon this writ is that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint."

(Cited with approval in *Ex Parte Mitsuye Endo*, 323 U. S. 283, 306 (1944).)

See also *Rivers* v. *Mitchell*, 57 Iowa 193 (1881); *Breene* v. *Breene*, 51 Colo. 342, 345-346 (1911); *Shaw* v. *Shaw*, 114 S. C. 300 (1920); cf. *People ex rel. Billotti* v. *New York Juvenile Asylum*, 57 App. Div. (N. Y.) 383 (1901).

The Government maintains that cases of this type are *sui generis*, apparently on the theory that "the true parties in interest" are in the state. However, in such cases, as here, the petitioner is not within the territorial boundaries of the state, and the party under whose authority the petitioner is confined *is* within those boundaries. Nevertheless, despite express statutory language that would appear to dictate a contrary result, these courts have made their interpretations in light of the common law.

Similarly in the case at bar, the petition for the writ named the responsible officers of the United States Government under whose authority the prisoners were tried and convicted and are now confined, and whose authority must be exercised if they are to be released. These persons are in the District of Columbia, not transiently, but permanently, and so are their headquarters, central records, and key subordinates and staffs. They have been personally served with process and are readily answerable and amenable to further process of the Federal courts in the District of Columbia. No special factors of hardship or inconvenience or of supervening public policy are involved; nor is there any question but that there will be due and prompt compliance by the petitioners and, through them by their subordinates, with any orders which such courts may issue with respect to the prisoners. These circumstances establish a close nexus between the District Court and the parties and subject matter of this proceeding. See Fairman, *op. cit.* at page 643.

(2) The second exception to the argument involving local sovereignties has to do with the rare cases in which the element of extraterritoriality does exist. Thus, the District of Columbia maintains as part of its penal system, workhouses at Occoquan, Virginia, and at Lorton, Virginia. Prior to the Supreme Court decision in *Ahrens* v. *Clark*

(supra), the Court of Appeals for the District of Columbia Circuit had held that the District Court for the District of Columbia could issue the writ with respect to prisoners confined in those Virginia institutions. *Sanders* v. *Allen*, 69 App. D. C. 307, 100 F. (2d) 717 (1938); and see *Burns* v. *Welch*, 159 F. (2d) 29 (C. A. D. C. 1947). See also *Sanders* v. *Bennett*, 80 App. D. C. 32, 148 F. (2d) 19 (1945). Since the *Ahrens* decision, such petitioners have been relegated to their rights in the U. S. District Court in Virginia, but the fact remains that for many years the rule was otherwise. It is difficult, therefore, to find support for the Government's contention that there was a "universality" of conception of the writ on a territorial basis (where extraterritorial conditions existed) that demonstrates an embodied limitation "inherited from the common law" of which Congress must have taken cognizance.

D. The concept of "Habeas Corpus" had a common law history that encompasses the instant problem.

The Government contends that English precedents indicate that the writ of habeas corpus did not extend to aliens confined abroad. Respondent maintains (1) that this is not so—and (2) in any event, if such precedents were of a limiting nature, they are no longer governing, our courts having constantly expanded habeas corpus jurisdiction.

(1) It is unlikely that a petition involving precisely this type of extraterritoriality has previously been brought to bar—that is, a trial by an American tribunal in a friendly country, after which the prisoners are incarcerated in an American prison located in the American occupation zone of a conquered country. However, some analogy may be found in some of the English cases involving petitions brought by prisoners who were confined beyond the seas, with the writ running to persons within the process of the court who had it in their power to effectuate the prisoner's release. Thus, narrowing the issue, there is ample

English precedent demonstrating that the writ ran beyond the territorial confines of the nation wherein the petition was brought.

Historically, the writ of habeas corpus ran "to all the dominions of the Crown". Church, *The Writ of Habeas Corpus* (2d Ed. 1893), § 107. Thus there are cases that show that in 1619 the writ ran to the "Cinque Ports" (*Bourne's Case*, 4 Cro. Jac. 543), in 1626 to the Counties Palatine (*Jobson's Case*, Latch 160) in 1669 to the islands of Jersey and Guernsey (*Rex* v. *Salmon*, 2 Keble 450), and in 1681 to Ireland (*Anonymous*, 1 Ventris 357).

Various defects in the writ of habeas corpus, "illustrated by the arbitrary proceedings of Clarendon, who, in 1667, was accused of sending persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the imprisoning of any other of his majesty's subjects in like manner'," 9 Holdsworth, *History of British Law* (1926) 116, resulted in the Habeas Corpus Act, 31 Car. II, sec. 58. This act provided that:

> "No persons are allowed to alter a prisoner's place of confinement except in certain specific cases defined by the Act. No prisoners may be sent to Scotland, Ireland, or parts beyond the seas. The writ is to run into the counties palatine and all other privileged places" (9 *Id.* at 118).

Church (*The Writ of Habeas Corpus*, 2d Ed. 1893, § 107) states that the Act of 31 Car. II (and subsequent statutes) were "but affirmatory of the common law principles. * * *" This would appear to be correct, for Section XI of the Act specifically says:

> "A habeas corpus, according to the true intent and meaning of this act, may be directed and run into any county palatine, the Cinque Ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding."

As we have seen, sixty years before this enactment the writ had been held to extend to the Cinque Ports, and ten years before, to Jersey and Guernsey (supra).

The Government, however, makes much of the fact that another section of this statute, Section *XII*, contains severe sanctions directed against removal of prisoners to distant points. These sanctions, it is argued, constitute "legislative recognition that such removals defeat the jurisdiction of English courts to order production of the bodies of the prisoners thus removed and to inquire into the legality of their imprisonment by habeas corpus" (Government brief, p. 39). Respondent submits that this is and must be a *non-sequitur*. It cannot be a correct deduction, because not only had it previously been held that the writ ran to some of the very locations mentioned in Section *XII*, but the preceding section of this very act affirmed that the writ did run to such areas. Thus, specifically, Section *XII* proscribed the transportation for imprisonment purposes of any English resident to "Scotland, Ireland, *Jersey, Guernsey*, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors." (Emphasis supplied.)

It is respectfully suggested that there were serious practical considerations that dictated the advisability of Section *XII* and that had nothing to do with jurisdiction. The problem of communications in 1679 was such that only the most fortunate of prisoners could avail himself of his jurisdictional rights if he were physically removed from England. Clearly the courts' powers were in no way infringed by the device of removal where a responsible supervisory official resided in England—but the chances were that the device would succeed in preventing the matter from ever commanding the courts' attention.

In any event, both before and since 1679, the English courts have consistently allowed the writ to persons confined abroad. *Ex parte Anderson*, 3 El. and El. 487, 121

Eng. Rep. 525; *Rex* v. *Coule*, 2 Burr, 834, 97 Eng. Rep. 587;[2] *Carus Wilson's* case, 7 Q. B. 984, 115 Eng. Rep. 759; see also Church, *Habeas Corpus* (1893) § 107. The case cited by the Government, *In re Ning Yi-Ching et al.*, 56 T. L. R. 3, holds only that the writ of habeas corpus would not run to a part of the world "which was not a part of the King's dominion or realm", an obvious holding since the writ could not there be enforced. The British concession in Tientsin was unique in character and "had never been recognized as nor was it, a part of the King's dominions." The American occupation of Germany can hardly be analogized to it; the British were in effect mere lessees. Secondly, in the *Ning Yi-Ching* case, which involved Chinese in the British concession of Tientsin, as a practical matter there was no person to whom the writ could be directed. And in the third place, the British were not exercising judicial or quasi-judicial power in Tientsin; they were holding Chinese prisoners for trial in a Chinese Court.

Indeed, the *Ning Yi-Ching* decision is authority against the position taken by the Government. For it recognized that the remedy of habeas corpus is "not confined to British subjects". Clearly, in the *Ning Yi-Ching* case, even if the petitioners had been British rather than Chinese the writ could not have issued.

The decision in *Rex* v. *Earl of Crewe* (1910) 2 K. B. 576, 26 T. L. R. 439, also is contrary to the Government's position. There the writ was sought for one Sekgoine Letsholathibe, the hereditary chief of the Batawana tribe in Bechuanaland, who was confined under authority of the High Commissioner in that British Protectorate. The King's Bench Division of the High Court of Justice (Lord Alverstone, P. J., and Ridley and Darling, JJ.) discharged a

[2] A statutory modification was made by the Habeas Corpus Act of 1862 as a result of the decision in *Ex parte Anderson*, *supra*, which had directed the writ to Canada, so that the writ would not run to places where there were courts competent to issue and enforce obedience to the writ. See *Rex* v. *Earl of Crewe* (1910) 2 K. B. 576, 26 T. L. R. 439; 9 Holdsworth, *History of English Law* (1926), 124-125.

rule to show cause why the writ should not issue, on the grounds (1) that the Bechuanaland Protectorate was a "foreign dominion of the Crown, &c." within the meaning of the statute passed in 1862 suspending the writ in "any Colony or Foreign Dominion of the Crown" where local courts were available (see note 2, p. 20, supra) and (2) that the Colonial Secretary was not the proper respondent. On appeal to the Court of Appeal (Vaughan, Williams, Farwell and Kennedy, L. JJ.) judgment was affirmed, principally upon the ground that a provision in the Proclamation that no writ involving detention of Sekgome should have any effect, was valid. As stated by Prettyman, J., in the Court below (R. 57):

> "In the course of the opinion, the judges made clear their opinions that the writ could issue at the petition of persons beyond the seas and that the writ could be addressed to an official having authority over the jailer; although they thought that the High Commissioner and not the Secretary would be the proper respondent, since the Secretary had only advisory power."

It is evident that the writ was denied because it had been suspended (a power given to the English Parliament but not to the American Congress) and were it not for the suspension, it would have been granted. Specifically, none of the judges denied that the writ would have issued to a non-British subject abroad, if the writ had not been suspended. Kennedy, L.J. explictly stated:

> "In my opinion the mere fact that a person in detention ought to be considered as not being in the strict sense of the term a British subject could not in itself be treated as impairing the jurisdiction of the High Court of Justice to direct the issue of the writ, if it were shown that his custodian was detaining him in the exercise of powers conferred upon him by British jurisdiction. The remedy obtainable by the writ is not confined to British subjects. The alien who is detained upon a warrant of extradition is entitled to

apply for a writ of habeas corpus in order to obtain release * * * ".[3]

Kennedy, L.J., incidentally, was the only one of the six judges who considered this matter who indicated any question as to whether the Protectorate was a foreign dominion of the Crown, a view apparently at variance with that held by the other five. The Government (Brief, p. 47) analogizes this minority view to the situation presented in *Neely* v. *Henkel*, 180 U. S. 109—where the problem was not one of jurisdiction at all, but where the Court held that the petitioner, who had violated Cuban law, was given no substantive constitutional claim simply because Cuba was under American military occupation. In the case at bar we are not considering substantive constitutional rights involved in a violation of "the laws of a foreign country" (*Neely* v. *Henkel*, 180 U. S. 109, 122) but we are considering the jurisdictional rights of prisoners who were tried by an American Military Commission for violation of the laws of war under the presumed authority of the American Constitution, Congressional statutes, treaties, and proclamations. The prisoners here do not stand in the position of Neely; substantively they stand in the position of Yamashita and Quirin. The only difference is the accident of locus of incarceration. See Fairman, Some New Problems of the Constitution Following the Flag, 1 Stanford Law Review 587, 623-626, 630-631.

In summary of the English precedents, we may say that long before the independence of this country the British found it necessary to enlarge the writ so that it would run outside England itself, since the writ, if limited jurisdictionally, permitted abuses of executive power. Contrary to what the Government states, it has never been decided that the writ may not issue to a foreigner in territory controlled by England, and indeed, the only expressions on the subject are to the effect that the writ is not solely the

[3] Kennedy, L. J., also concurred on the ground that the writ had been lawfully suspended as to petitioner.

right of British subjects. Traditionally, neither petitioner's absence from the territorial jurisdiction of the Court nor his alienage, barred the Court from entertaining the petition where there was a responsible official to whom the writ could be directed.

(2) Assume for purposes of argument that the Government's contention about the English precedents is correct—even so they are not governing. *Frank* v. *Magnum*, 237 U. S. 309, 330-331, unequivocally states that Congress has liberalized the common law procedures of habeas corpus "in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder * * *" See also *Johnson* v. *Zerbst*, 304 U. S. 458, 466-467. The English common law is thus no longer governing as to either the procedures or the scope of habeas corpus. *Frank* v. *Magnum, supra; Johnson* v. *Zerbst, supra;* dissenting opinion of Mr. Justice Frankfurter in *Sunal* v. *Large*, 332 U. S. 174, 184. No more should it be, or has it been, limiting as to jurisdiction. Especially in habeas corpus, jurisdiction to issue is the essence of the substantive right to the writ. "There is no room for niggardly restrictions when questions as to its availability are raised." Concurring opinion of Mr. Justice Douglas in *Hirota* v. *MacArthur*, 338 U. S. 197. And this Court has recognized, in a case relating to jurisdiction, that the English precedents are not governing. Mr. Chief Justice Chase in *Ex parte Yerger*, 8 Wall. 85 wrote:

> "* * * the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States, and this tendency, except in one recent instance, has been constant and uniform."

The argument based upon supposed English precedents is part and parcel of the argument to the same effect in

Price v. *Johnson*, 334 U. S. 266. There the Government argued that since the English courts had never issued a writ of habeas corpus for the purpose of producing a prisoner to argue his own appeal, the American courts were powerless to do so. The Court rejected this contention, saying that a court of appeals, in issuing a writ of habeas corpus is not "necessarily confined to the precise forms of that writ in vogue at the common law as in the English judicial system". The Court refused to read Section 262 of the Judicial Code (now 28 U. S. C. § 2241) "as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'"

Elsewhere in the same opinion the Court recognized that the writ of habeas corpus must be elastic, both jurisdictionally and substantively. "The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ." *Id.* at 283. And as Mr. Justice Frankfurter wrote in his dissent in *Sunal* v. *Large*, 332 U. S. 174, 187, "Perhaps it is well that a writ the historic purpose of which is to furnish 'a swift and imperative remedy in all cases of illegal restraint,' • • • should be left fluid and free from definiteness appropriate to ordinary jurisdiction doctrines", a view which the other dissenters in the same case unqualifiedly endorsed.

In short, in no area—substantive, procedural, jurisdictional—has habeas corpus been limited to the English predecents.

E. Section 4 of the Habeas Corpus statute specifically applies to respondent.

Regardless of whether the general habeas corpus statute permits the respondent to invoke the jurisdiction of the District Court, a statute, especially designed to meet the problems of confinement of foreigners under American authority, has been passed by Congress, and this statute, although it relates, to be sure, to the substantive right to

the writ, clearly intends that the courts of the United States shall have jurisdiction to issue the writ where officials embarrass the United States in its foreign relations by holding a foreigner in custody. Since such embarrassment is perhaps even more likely to occur where the foreigner is held in custody abroad, rather than within our own territory, the statute is largely unfulfilled if interpreted to permit inquiry on habeas corpus only into restraints at home. 28 U. S. C. § 2241(c) provides:

> "The writ of habeas corpus shall not extend to a prisoner unless—
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations . . . ."

Although phrased in terms of an exception, the legislative history shows that this statute was passed in order to effect a definite grant of power. As was said in *In re Neagle*, 135 U. S. 1, 71 (1890), "this extension arose out of the celebrated *McLeod* case, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that state. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed. He was, however, tried and acquitted and afterwards released by the state of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus by the Act of August 29, 1842, 5 Stat. 539, C. 257 entitled 'An Act to provide further remedial justice in the courts of the United States.' It con-

ferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations." For a further history of the *McLeod* case and the statute which was passed as a result of it, see 2 Moore's *Digest of International Law* (1906) 24; 1 Morison and Commager, *The Growth of the American Republic* (3d ed. 1942) 475-84; II Warren, *The Supreme Court in United States History* (Rev. Ed.) 65-66, 98-100, 587; *Underhill* v. *Hernandez*, 65 Fed. 577 (2d Cir.) aff'd 168 U. S. 250; *Horn* v. *Mitchell*, 223 Fed. 549 (D. C. Mass.), aff'd 232 Fed. 819 (1st Cir.), appeal dismissed, 243 U. S. 247. See also *People* v. *McLeod*, 25 Wend. 483 and the note in 26 Wend. 663.

Although it is clear that the statute in question was originally passed to assert federal dominance in a federal-state conflict of power (see the remarks of Senator Berrien quoted in *In re Neagle*, 135 U. S. 1), nevertheless the wording of the legislation bespeaks a purpose beyond its motivating cause. There can be no doubt that respondent and those on whose behalf he seeks habeas corpus are within the scope of the statute. They are: (1) citizens of a foreign state; (2) domiciled in a foreign state, whether considered Germany or China; (3) in custody; (4) for acts done or omitted under alleged right, title, authority, privilege, protection or exemption claimed under the commission, order or sanction of any foreign state, or under order thereof, the validity and effect whereof depend upon the law of nations. This final requirement is clearly met by the charge in the original trial that the respondents both "individually and as officials, nationals, citizens, agents or employees of Germany" acted "in violation of the laws and customs of war" and by the prisoners' present claim that in fact they were not charged with an offense against the laws of war and are protected by the Geneva Convention, by treaties between the United States and China, and by the fact that under international law [illegible] the absence

of hostilities, martial law or American military occupation of China, an American military commission could have no jurisdiction. All the requirements of the statute are thus satisfied. Congress refused after the *McLeod* case to permit flaunting of its authority by states where the laws of nations were concerned and passed a statute in order to prevent such future difficulties. The statute makes no statement that the confinement must be by a state, and the cases which have discussed the statute have made no assumption that it is applicable only to confinements by a state. Indeed the assumption seems to be to the contrary. *Underhill* v. *Hernandez, supra*, 65 Fed. 581, 682; *Horn* v. *Mitchell, supra*, 232 Fed. at 823-824.[4] Its major purpose is to assure supremacy of the federal courts by whatever authority it be challenged. Here the challenge is by the military. This challenge, like that of a state, falls within the wording of the statute.

II

Interpretation of the habeas corpus statutes so as to deny jurisdiction to issue the writ in this case would constitute a suspension of the writ in violation of Article I, Section 9, of the Constitution.

(1)

The issue in this case goes far beyond mere statutory interpretation. It goes to one of our most fundamental governmental postulates: that the Judiciary is guardian of the rights given by the Constitution and laws of the

[4] In the latter case the statute was held inapplicable by the Circuit Court of Appeals, affirming a similar holding by the District Court, 223 Fed. 551-552, on the ground that there was not express or implied national authority for the acts of the petitioners, nor was there any question of international law involved. But both the District Court and Court of Appeals clearly assumed that had the requirements of the statute been met, the German officers, held in custody by federal, not state, authority would have been entitled to the writ.

United States. The entire question here is whether the prisoners are to have a day in court. In order to deny it to them, this Court must say that the Executive can flagrantly violate the Constitution and laws of the United States; while the Judiciary stands by, powerless to act.

As we have indicated, we think it clear that Congress desired no such result, and that it intended the scope of the writ of habeas corpus to be co-extensive with the scope of executive power to restrain bodily liberty. We think it equally clear that, even if it so desired, Congress could not, in view of Article I, Section 9, of the Constitution, effectively denude the federal judiciary of the power to examine into a case of illegal detention under American authority—whether of citizen or alien, whether at home or abroad.

We see no gap in the habeas corpus enactments, such as the Government sees. But if there should be such a gap in the statutes, there is certainly none in the Constitution. In forbidding Congress to suspend "the privilege of the Writ of Habeas Corpus", the draftsmen of the Constitution appended none of the qualifications which the Government now asks this Court to infer. The Constitution does not secure the writ only to citizens, nor only to persons confined within "the respective jurisdiction" of the Federal Courts, or indeed in any other localities. With such fine factual differentiations, the Founding Fathers were not concerned—only with the broad, unquenchable conviction that the Courts should stand guardian over personal liberties and that illegal executive arrests should have their remedy.

We would imagine that the Government would concede the invalidity of a Congressional statute which said that no federal court could issue the writ into Duluth, Minnesota, or into a federal reservation in Wyoming. We would imagine also that it would concede that, by force of the Constitution, the writ would issue to an area included within one of our states or territories, even though, by inadvertence, that area had not been included by Congress

within the jurisdiction of one of the components of the federal judiciary. We say that, also by force of the Constitution, and regardless of what Congress has or has not done, the writ must issue where American officials acting in their official capacity and as representatives of the United States Government have illegally tried and illegally condemned, and now are illegally holding in confinement persons subject to the authority of the United States. The accident—or coincidence—that the confinement is in an American prison in Germany instead of in an American prison in Kansas cannot, we say, impair the responsibility to act imposed by our Constitution upon our judiciary. It is unthinkable that the availability of the historic writ of habeas corpus could be permitted to depend completely upon the whim of the jailer—a jailer who simply by selecting a place of confinement outside the United States could render the Courts impotent to scrutinize his acts.

(2)

This Court held in *Ex Parte Yamashita*, 327 U. S. 1 (1946), and in *Ex Parte Quirin*, 317 U. S. 1 (1942), that an accused enemy war criminal may come into the American Courts and challenge the fundamental constitution of the tribunal which tried him and the validity of the charge. Yamashita and Quirin got into court without question because they were in prison on American soil. The posture of this case is different only in that the present confinement is in American-occupied Germany. It is upon this difference, and this difference alone, that the Government relies for its contention that there is no jurisdiction here to issue the writ. For there is no question but that if the Army had chosen to incarcerate these respondents in a penitentiary within the United States instead of in Landsberg Prison in Bavaria, *Yamashita* and *Quirin* would have stood as unassailable authority, not only for the jurisdiction of the federal judiciary, but also for the prisoners' substantive right to have declared void a convic-

tion based upon an improper charge or an improperly constituted tribunal.

The Government says that because these prisoners are now confined in Germany they have no right, under American law, to be freed even if improperly convicted. Since they have no substantive rights whatsoever, the Government asks, how can they possibly be confined illegally? How can anything that the American military authorities do with them or to them be illegal? And how can there possibly be any jurisdiction in the federal judiciary to issue a writ of habeas corpus to vindicate their nonexistent rights? This is not to say, the Government makes haste to interject, that American officials abroad have carte blanche to violate American law in dealing with enemy aliens. "It is our position that non-resident alien enemies have no rights under American law, even though American officials must act under and in accordance with that law" (Government's Brief, p. 67).

We must confess that we find this line of reasoning most puzzling. We are confronted with the picture of two enemy aliens, both convicted of war crimes, possibly by the same tribunal. One is imprisoned in an American territory, the other in an American prison in Germany. The first, this Court has already held, would have fundamental rights with respect to trial and conviction; the second, the Government would have us believe, because of the place of his imprisonment, has no such rights. Even if the Military Commission which convicted him did not "act under and in accordance with American law", as it was duty bound to do, there is nothing that he can do about it because he has "no rights under American law". But, if some day—possibly upon the consummation of a German peace treaty—he should be transferred to an American prison, he would then presumably for the first time become possessed of substantive rights with respect to his original conviction which would date back to the time of such conviction and render it illegal nunc pro tunc.

The difficulty of the Government's position is that if is trying to turn back the clock on *Yamashita* and *Quirin*. In *Yamashita*, as here, the Government vigorously urged that the prisoner had no substantive rights worthy of the protection of the Court. If questioned the right of an enemy alien to come into court, and questioned whether once in, he was possessed of any rights capable of being vindicated. The fundamental power of this Court to pass on any phase of a war crimes case was also put into issue, it being contended that the issues involved related to "foreign policy" or to the "war power" and were peculiarly exempt from the scrutiny of this Court.

All of these propositions this Court summarily rejected. The Court held instead that even a defeated enemy must be dealt with in accordance with law. This rule, we maintain, must apply regardless of the geographical locality in which the defeated enemy is confined after conviction.

In arguing as to the prisoners' substantive rights, the Government appears to be doing what it was told not to do in *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U. S. 129, 142, namely arguing the merits of the case when preliminary issues have not been decided. For, certainly the question of jurisdiction of the District Court must be disposed of before the questions as to the validity of the confinement under the Constitution and under the various pertinent statutes and treaties can arise. To say, as the Government does, that there is no tribunal which has jurisdiction because the prisoners have no rights and that the prisoners have no rights because there is no tribunal with the jurisdiction to enforce them is, indeed, burning the candle from both ends.

The Government, by its argument premising lack of jurisdiction upon lack of substantive rights, asks this Court to disregard one of its fundamental tenets: that constitutional questions should not be decided unless absolutely necessary. *Reserve Army* v. *Municipal Court*, 331 U. S. 549; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *United Public Works* v. *Mitchell*, 330 U. S. 75;

Alma Motor Co. v. *Timken-Detroit Axle Co., supra;* Mr. Justice Brandeis concurring in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288. The Court of Appeals paid heed to this wise rule of judicial administration in its opinion in this case, saying (R. 58):

> "Whether given circumstances place a given action outside an apparent constitutional prohibition and so within constitutional power, is a different question, to be established by proof and not to be considered unless raised and supported. This is a matter of judicial jurisdiction."

There will be ample time to consider which, if any, of the various provisions of the Constitution, statutes and treaties invoked by us herein are applicable to enemy aliens confined abroad, after this Court has held that there exists a tribunal with the jurisdiction to give such consideration.

Without pausing at this time to argue our case on the merits, we might observe that the Government would find it most difficult to argue that the Geneva Convention for the Treatment of Prisoners of War—which we claim to have been violated here—was not intended by the Senate which ratified it to apply to enemies taken prisoner abroad. We think it equally clear that the treaties, decisions and principles which make up the "laws of war" which the Constitution in Article I, Sec. 8, Clause 10, expressly authorized Congress to deal with and which this Court has recognized as a part of the body of American law (*Ex Parte Quirin, supra*) must also, by their very nature, have application wherever our Army finds itself—at home or abroad. Indeed, unless this body of law has application to our army abroad, there remains no basis upon which American commanders in the field even have the basic authority to convene war crimes tribunals in the first instance. And, whatever may be the ultimate view which this Court may take as to the applicability of the Due Process Clause to action of the military abroad, we would suppose that it would be taken on the basis of full consideration of the merits and not upon a preliminary determination of jurisdiction.

(3)

Whether statutes and treaties, such as the Geneva Convention, apply to our officials outside our borders is merely a matter of the intent of the draftsmen; for it is obvious that regulation of the conduct of United States officials outside our borders may be appropriate to effectuate, and thus would be within a number of the powers granted by the Constitution to Congress and the Executive.[5] But more important, as the Court of Appeals pointed out, the Constitution determines the validity of acts of United States officials no matter where they take place; "constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory" (R. 58). The fact that officials of the United States act outside thereof obviously cannot release them from the terms of their agency to act for the people of the United States which are set forth in the Constitution, or in treaties or statutes, the validity of which is in turn referable to the basic document.[6] As established in the controversy that arose during the extension of the United States' power at the beginning of the 20th Century:

> "Every function of the Government being * * * derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable * * * in every instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but

[5] See *Cook* v. *United States*, 288 U. S. 102, construing the Tariff Act and a treaty with Great Britain, both of which included provisions affecting seizures by United States officials outside the territorial waters of the United States; *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, construing a statute as applicable outside the United States; *Foley* v. *Filardo*, 336 U. S. 281, 285; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

[6] "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. * * * " "The Federalist", No. 78.

whether the provision relied on is operative" (*Downes* v. *Bidwell*, 182 U. S. 289, 292; see *Balzac* v. *Porto Rico*, 258 U. S. 298, 305).[7]

"The Constitution of the United States is in force . . . wherever and whenever the sovereign power of that Government is exerted"-(*Balzac* v. *Porto Rico*, at p. 312); those provisions which are basic and fundamental restrictions upon the United States government must be deemed operative even though the territory in which the officials act is not a part of the United States (*ibid.*; see also *Dorr* v. *United States*, 195 U. S. 138, 149). For obligations and duties are the accompaniment of power.[8]

The explicit language of the Constitution itself shows that it was deemed to be an instrument controlling the conduct of the United States government wherever its sovereign power was exerted rather than merely within the United States. Some provisions restrict the United States in any exercise of its "jurisdiction", rather than throughout its territory, with the clear intention of covering exercises of power outside United States territory.[9] And this Court held in a decision which has been repeatedly cited and has never been doubted or deprecated, that the restrictions imposed upon United States officials by the Constitution apply to them outside the United States:

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[7] The dissent from this view was on the basis that *all* Constitutional provisions should everywhere be deemed applicable, rather than that our officials could anywhere be deemed altogether free from Constitutional restrictions. See discussion in *Balzac* v. *Porto Rico*, 258 U. S. 298.

[8] *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 314.

[9] Thus, the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction". That "place subject to their jurisdiction" refers to places outside the United States is apparent from the phraseology of the Amendment; and that "jurisdiction" is used in the sense of power is also clear from its usage in other parts of the Constitution (see Article III, Secs. 2 and 3; Article IV, Sec. 2; Eighteenth Amendment).

specifically, that the powers of the Commander-in-Chief are restricted by the Fifth Amendment though he acts in foreign territory (*Mitchell* v. *Harmony*, 13 How. 115; see also *United States* v. *Russell*, 13 Wall. 623, 628).

Even assuming, however, that the trial and conviction of the prisoners was not controlled by any of the prohibitory provisions of the Constitution, their detention is, assuming the truth of their allegations, in violation of the Constitution. For unless the detention is in conformity to a valid delegation of power from the Congress and the President as Commander-in-Chief, or at the least, from the Commander-in-Chief acting alone, the force of the United States is being exerted outside the scope of constitutionally granted powers. Insofar as Congressional delegation is concerned, it is clear under the *Quirin* and *Yamashita* decisions that the only authority granted by Congress to military tribunals was to hold trials for violations of the law of war; the delegation from the Commander-in-Chief was in the instant case similarly circumscribed.[10] Assuming a valid delegation from the Commander-in-Chief to the Joint Chiefs of Staff, the terms of their delegation to General Wedemeyer were for him "to appoint a United States Military Commission in China for the trial of violation of the laws and customs of war" (R. 49).[11] No other power

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[10] Compare *Mechanics' Bank and Traders' Bank* v. *Union Bank*, 22 Wall. 276, 297, where this Court assumed that the President as Commander-in-Chief had the power to establish a civil court in occupied territory but recognized that the validity of its establishment depended upon whether the officer who performed the act had had such power delegated to him.

[11] The full statement of the Tribunal's jurisdiction was "Authority granted, provided the Chinese Government acquiesces, to appoint United States Military Commission in China for the trial of violation of the laws and customs of war and German soldiers, civilians, and consular officials, and such other persons as you may determine, who are charged with violation of German surrender terms" (R. 49). That this authorization was intended to permit trial for violation of the German surrender terms only *insofar* as such violation might constitute a violation of the laws of war is apparent from the fact

of punishment was delegated. Thus, whether or not the detention was within the delegation and thus was constitutional depends, even assuming the broadest powers of the Commander-in-Chief, on whether the offense for which respondents were tried was a violation of the laws of war; as in *Yamashita*, the "military orders only authorized trial if the charge was for a violation of the laws of war" (327 U. S. at p. 13).

Whatever argument might be made as to the inapplicability of Constitutional prohibitions outside the United States, or to enemy aliens outside the United States, it seems incontrovertible that the Constitutional assignment of powers is controlling wherever and whenever United States officials act. See *Knauff* v. *Shaughnessy*, 338 U. S. 537, where this Court recently reviewed the constitutionality of a Congressional delegation to the President, on the petition for habeas corpus of a non-resident enemy alien who was technically outside the borders of the United States.[12]

Thus, respondents' detention is unconstitutional because it has not been effected under the powers delegated by the Constitution either to the President or to Congress, if, as their petition alleges, the acts for which they were tried and punished did not constitute a violation of the laws of war. In view of this Constitutional issue, the purpose of the habeas corpus statute dictates that it be interpreted to grant jurisdiction to consider respondent's petition.

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that this phrase was deliberately introduced into the authorization though it did not appear in the request (R. 47); that the two phrases defining the tribunal's jurisdiction are to be read as qualifying each other rather than in the conjunctive is also apparent from the circumstance that the entire authorization was only to cover trials of persons violating the surrender terms (see request for authorization, R. 47). That the authorization was understood to be limited to trials for violation of the laws of war is clear from the charge (R. 25-26).

[12] Compare *Prize Cases*, 2 Black. 365, as to review of the scope of the power of the Commander-in-Chief though the act in question was effected outside the United States.

(4)

The Court below emphasized its conviction that the question presented herein could not be answered by "casual references to statutes or cases" since it "stems directly from fundamentals" (R. 55). The most fundamental of the "fundamentals" enunciated by the Court was this: that "in our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power" (R. 56).

We should not think that this restatement of the constitutional role of the judiciary would be open to serious debate at this stage of our nation's history. And yet the Government denies it: It "is certainly far from a universal proposition, admitting of no exceptions" (Government's Brief, p. 61). Particularly in the realm of foreign affairs and the conduct of wars, it urges, the Executive may be immune from judicial inquiry. Under such circumstances, it says, the prisoners—aggrieved victims of illegal executive action—can seek redress only through executive channels.

It is hardly necessary for us to say that this Court has never held that unconstitutional action of the Executive in the field of foreign affairs is beyond the power of the Court to remedy. If it has held that foreign affairs are placed by the Constitution primarily within the Executive and Legislative domain so that those arms of the Government have therein a wide range of constitutional discretion (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297; cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304) that is a far cry indeed, from holding that they have carte blanche to act illegally and unconstitutionally within that area. And, needless to say, this Court has not hesitated to make it clear that even treaties with foreign governments—the classic form of action in the international sphere—must accord with the mandates of the Constitution, and are subject to judicial scrutiny in the event of question (*Missouri* v. *Holland*, 252 U. S. 416).

It scarcely contributes to clarity to say that even if these prisoners are possessed of rights which have been and are being violated, they nevertheless remain without remedy. Whatever the form of words employed, the issue remains the same. Can the Executive restrain individual liberties in violation of the Constitution, laws, and treaties of the United States and not be answerable therefor to the Judiciary?

(5)

This Court has already indicated its awareness of the fact that the question at issue is not limited to alien enemies or even to aliens. If the Government reads *Ahrens* correctly and the jurisdiction of the federal judiciary does not extend to cases of confinement abroad, not merely aliens but also American citizens will find themselves without recourse against illegal detention by the American military. As Mr. Justice Douglas stated in his concurring opinion in *Hirota* v. *MacArthur*, 338 U. S. 197:

> "Today Japanese war lords appeal to the Court for application of American standards of justice. Tomorrow or next year an American citizen may stand condemned in Germany or Japan by a military court or Commission. If no United States court can inquire into the lawfulness of his detention, the Military have acquired, contrary to our traditions * * * a new and alarming hold upon us."

Mr. Justice Douglas went on to detail, in a footnote, the growing significance of the problem:

> "Cases of this sort are beginning to appear. Re Bush, 336 U. S. 971 is such a case. Petitioner was a civilian employee of the War Department from Feb. 19, 1946 to Dec. 28, 1947 and was stationed in Japan for most of that period. He terminated his employment and returned to this country. Thereafter, he was en route to Siam when his plane landed in Japan. He was arrested and tried by a General Provost Court, sitting in Japan for trading American goods to a Japanese for certain emoluments. He was convicted

and sentenced to one year imprisonment and fined 75,000 yen. On May 9, 1949, we denied his motion for leave to file a petition for habeas corpus 'without prejudice to the right to apply to any appropriate court that may have jurisdiction.'

"For a somewhat comparable case from Germany see Bird v. Johnson, 336 U. S. 950 where we denied motions for leave to file petitions for writs of habeas corpus on April 18, 1949."

See also:

Fairman, *Some New Problems of the Constitution Following the Flag* (1949), 1 Stanford L. Rev. 587.

Mr. Justice Rutledge, in his dissenting opinion in *Ahrens*, joined by Mr. Justice Black and Mr. Justice Murphy, also expressed concern lest the decision have the effect of precluding habeas corpus at the behest of citizens, both civilians and members of the armed forces, who had either been detained pursuant to sentence imposed for alleged offenses or confined "for indefinite periods without charge and without trial." Similarly, the commentators have been practically unanimous in urging that Americans abroad not be deprived of their right to habeas corpus—a denial which logically must follow if jurisdiction is lacking in this case. See Fairman, Some New Problems of the Constitution Following the Flag (1949), 1 Stanford L. Rev. 587; Wolfson, Americans Abroad and Habeas Corpus (1948), 9 Fed. B. J. 142; Wolfson, Americans Abroad and Habeas Corpus: The Trap Begins to Close (1949), 10 Fed. B. J. 69; Requirement of Local Detention for Federal Habeas Corpus Jurisdiction (1949) 16 U. Ch. L. Rev. 335; Habeas Corpus in Federal District Courts—Jurisdiction Over Parties (1948) 3 Miami L. Q. 52; Jurisdictional Questions in Federal Habeas Corpus Cases (1949) 29 B. U. L. Rev. 238.

These grave implications cannot be lightly waved aside upon the assumption that a decision as to alien enemies will not determine the case as to citizens. If the statutory

jurisdiction of the federal judiciary ends when the prisoner is over our borders and if there is not additional jurisdiction by virtue of the Constitution, on what basis will the Federal District Courts be able to act—either as to alien or citizen? Certainly there is nothing in the statute or in the Constitution which distinguishes between aliens in confinement and citizens in confinement. Nor has this Court ever drawn any such distinction. This Court has at least three times already held that enemy aliens held within American territory for alleged war crimes are entitled to the writ of habeas corpus (*Ex parte Quirin, supra: In re Yamashita, supra; Ludecke* v. *Watkins*, 335 U. S. 160). And, of course anyone, citizen or alien, brought forcibly to this country from abroad may seek the writ (*In re Territo*, 156 F. (2d) 142 (9th Cir.)).

We see no escape from the conclusion that if aliens confined by the United States abroad do not have a right to the writ, citizens confined abroad do not have it either. The Government believes that a distinction is possible—apparently upon the basis of the English history—but it does not attempt to explain how such a distinction could be made to square with its purely *geographic* view of the *Ahrens* case. As we have indicated in some detail under Point I, we do not think that the English cases—for whatever they are worth—are opposed to our position. They have certainly drawn no distinction based upon the citizenship or alienage of the prisoner.

Having made this faint attempt to show how an exception could be carved out for American citizens, if the Court should be so disposed, the Government goes on to urge that, actually there is no difference between citizens and aliens on this point—that neither has a right to the writ. This conclusion the Government views with equanimity. Indeed, seems to imply the Government, since "the Constitution can have no operation in another country," American citizens abroad, like aliens, can lay claim to no substantive rights of any kind whatever.

There is nothing in the history of the making of the Constitution to tell us what the Framers would have thought of these propositions. In 1789 American power was somewhat less than global. The Framers could not have anticipated that some day the rule of the United States Government would extend throughout the world. Much less could they have anticipated the forms in which that rule would be cast: as sole or joint military occupant, as lessee of military bases, as protector, or as the holder of some other kind of power over territories and populations short of total sovereignty. What they could and did anticipate was that there would be occasions of abuse of power by the Executive against which only the great prerogative writ of the English common law could afford protection. This writ they cherished highly—so highly that they forbade Congress, except in time of national emergency, to tamper with it. If exceptions are now for the first time to be carved into it, if citizens or aliens or both are to languish in illegal confinement without hope or remedy simply because they are in a penitentiary across the seas, the writ of habeas corpus can never again be the "Freedom Writ" in the full and unconditional sense envisioned by the Framers.

(6)

We have said that under the Government's view the availability of the writ would rest upon the whim of the jailer. The proposition we think is self-evident. If the place of confinement governs, the Executive, which selects the place of confinement, has an obvious power to decide whether the writ shall or shall not lie. Similarly, we may remark, Congress which is expressly forbidden to suspend the writ, could accomplish precisely that result by decreeing that certain types of offenders, alien or citizen, be confined in penitentiaries outside the territorial boundaries of the various District Courts. Whether this rule would extend so far as to cover American citizens convicted of

federal offenses in United States District Courts would depend upon how far this Court chose to broaden the rule enunciated in *Ex Parte Endo*, 323 U. S. 283 (1944). In the *Endo* case, the prisoner was within one District when the petition was filed and was removed to another District during the pendency of the proceedings. The Court expressly reserved the question whether the writ would have issued if the prisoner had been removed from the District before bringing his petition. Under the strictly territorial conception which the Government has advanced herein, it would seem that any person, citizen or alien, could be irrevocably stripped of his right to the writ by transportation across the American border before he has a chance to institute a proceeding.

If it be felt that we are conjuring up remote and terrible fancies, let it be remembered simply that a great constitutional safeguard, no less than a statute, is capable of being eroded away by the grinding action of "judicial activism". That is why, as this Court has been so quick to recognize, unpopular causes—as this case might perhaps be regarded—present a very special challenge to the integrity of the constitutional process. How far is it from the rule that enemy aliens have no rights, to the rule that friendly aliens—or soldiers serving abroad—or citizens in confinement abroad—or other classes or categories of human beings—likewise have no rights?

But we do not have to go beyond the record in this case to see its unfortunate implications. The Government tells us candidly what the Army's policy is with respect to American citizens convicted in Occupied Europe (Government's Brief, p. 75, fn. 57):

> "Women citizens convicted by the military government courts (now the courts of the High Commission) are returned to the United States immediately after final conviction, regardless of the length of sentence; male citizens convicted by those courts are returned, after final conviction, if their sentences exceed six months."

"Habeas corpus", the Government notes, "is available to such prisoners on arrival here." Here, truly, is habeas corpus by Executive indulgence—with the feminine gender getting a narrow but rather neat edge in the matter of the historic writ. While we suspect that the Occupation authorities are motivated at least as much by housing problems as by considerations of gallantry, the lesson pointed by this bit of administrative practice is none the less sharp. If this Court upholds the Government, it establishes also that access to the writ may be granted or withheld at will by the Occupation authorities, and thus effectively suspends the writ in contravention of the Constitution.

III

The fact that the upholding of jurisdiction will place a burden of adjudication upon the District Court for the District of Columbia cannot afford a basis for denying such jurisdiction.

(1)

It is suggested that if the Court upholds the jurisdiction of the federal judiciary, the District of Columbia will be flooded with a vast number of petitions. The burden will be so extraordinary, says the Government, that it cannot possibly be believed that Congress, in drafting the statute, intended it to be borne. We cannot believe that the Government seriously intends to put forth the statistics of 1950 as having entered into the calculations of the Congress of 1867 which first drafted the habeas corpus statute in its present form. If we thought so we should be quick to counter with statistics showing that the number of cases of confinement abroad on or about 1867 were so very few that no question of heavily burdening the federal judiciary could even have remotely arisen in anyone's mind at that time.

We assume that, while the Government has couched its argument in terms of the legislative intent of Congress, it

is really addressing itself to a supposed policy-making—or "legislative" power—of this Court.

Even if the Government were absolutely sound in its estimate of the volume of litigation involved, it would hardly afford a basis for denial of jurisdiction. We know of no case where the Court has allowed an administrative consideration of this kind to enter into the determination of a jurisdictional question. In *Holiday* v. *Johnson*, 313 U. S. 342, the Court swept aside such considerations and invalidated the delegation of fact-finding to commissioners. Nor was the Government successful in *Price* v. *Johnston*, 334 U. S. 266, in urging that for "practical" or "administrative" reasons, the Court should refuse to entertain successive applications.

We do not think that the Government's "practical" suggestion is a worthy one particularly as applied to cases which involve either capital punishment or long prison sentences. The scope of judicial review under the writ of habeas corpus is, at best, a very limited one, going as it does only to jurisdictional questions. If the Army has been diligent to act in accordance with law—as we must assume it has—there should not be so many occasions when petitions from abroad will disclose merit upon their face. To suggest, as the Government virtually has, that persons who have been illegally condemned to death or imprisonment should fulfill their illegal sentences rather than that the District Court should be burdened, is, we feel, most inappropriate.

In any event the burden of litigation that will necessarily arise if the Court upholds our contention herein will be far less than the Government intimates. The 400,000 cases tried before Military Government Courts as an incident of the Occupation are entirely different in nature from the instant case tried before a military commission as an incident of command in the field. While the Court has described in *Yamashita* and *Quirin* the minimal requirements of American law as to war crimes prosecutions, it has made no such

finding as to military government prosecutions. *Neely* v. *Henkel*, 180 U. S. 109, would suggest that violations of occupation edicts might be treated as violations of foreign law and so dissimilar to violations of the laws of war which have been held to be part of the body of American law (*Ex Parte Quirin*, *supra*). If this should be the holding, there would appear to be little or no basis upon which persons convicted by military government tribunals could seek redress in the American courts. As a practical matter, moreover, the overwhelming preponderance of the military government cases was disposed of in Allied Courts and, so, apparently, is completely outside the orbit of the Federal judiciary (*Hirota* v. *MacArthur*, 338 U. S. 197).

We are left, therefore, with two main classes of cases: (1) war crimes prosecutions before purely American military commissions; and (2) prosecutions of American civilian and military personnel before purely American courts-martial. We feel confident in asserting that the numbers of these cases which would give rise to petitions for writs of habeas corpus can scarcely be large enough to cause concern on the administrative level. Certainly, the Court of Appeals, which has primary concern with the administration of justice within the District of Columbia Circuit—and which has evinced a keen sense of its responsibility with respect to the habeas corpus docket of the District Court (*Dorsey* v. *Gill*, 148 F. (2d) 857)—did not consider the administrative factor important enough to defeat jurisdiction.

(2)

If, however, there be an administrative problem, the short answer is that there can be legislative correction. Certainly, any undue burden on the District Court for the District of Columbia could be alleviated by a distribution of the petitions throughout the Circuits. Statutes of this type have already been suggested. See, *e.g.*, Wolfson, Americans Abroad and Habeas Corpus (1948), 9 Fed. B. J. 142; G. I's Overseas and Habeas Corpus. (1949),

1 Stanford L. Rev. 555, 559. This does not mean that it is desirable or, for that matter, constitutional for Congress to make a comprehensive disposition of all of the questions of jurisdiction which may arise. As Professor Fairman has stated (1 Stanford L. Rev., at 643):

> "It is believed desirable that the problem be handled without legislation. A statute conferring jurisdiction to hear applications from particular categories of petitioners might seem to imply that the writ was not available to others. To what categories should the writ be available? To citizens (regardless of the type of tribunal by which they were tried), but not to aliens? To persons held under our power as an occupant? These are questions better answered by the judiciary, after argument, than by legislation."

IV

The petitioners, as superiors in the direct line of command over the commandant of the prison, with admitted power to effectuate the release of the prisoners, are proper parties to whom the writ may be addressed.

If power to issue the writ on behalf of persons outside the territorial jurisdiction of the District Court exists, it is unnecessary to debate the issue as to the proper respondent. Named as respondents in this proceeding were the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the United States Army, and the members of the Joint Chiefs of Staff, as officials resident in the District of Columbia who "have jurisdiction and supervision over the official acts of the Commandant of Landsberg Prison" (R. 12). In its petition for certiorari the United States admits that "these officials have power to effectuate a mandate which the district court might issue for the release of the prisoners. * * *" The case thus takes on the posture of *Ex parte Endo*, 323 U. S. 283, 304-305 (1944), where the Court was advised that the writ would be obeyed.

even though no respondent was ever served or had appeared. See also *Ex parte Yarbrough*, 110 U. S. 651, where the Superintendent of Albany penitentiary rather than the United States Marshal, for the Northern District of Georgia, made a return to the show cause order.

In view of the Government concession that the named officials have power to effectuate any order of the Court, arguing that because they are not the immediate jailers of the prisoners they are not proper respondents is merely a quibble. See Vaughn Williams, L. J., in *Rex* v. *Earl of Crewe* (1910), 2 K. B. 576, 26 T. L. R. 439. In view also of this concession, it is similarly a quibble to say that there has been no express waiver of the issue.

In any case the respondents named were proper. In *Wales* v. *Whitney*, 114 U. S. 564, the order of the Secretary of the Navy, placing Wales under arrest, did not, it was held, confine Wales so as to allow him the writ of habeas corpus, since he was free to come and go. But there was no question that had the Secretary of Navy ordered Wales actually incarcerated, the writ would have run against him absent, of course, an immediate jailer. Indeed, the Court implies that in such a case the writ would properly have been directed against the Secretary.

> "It is said in argument that such is the power exercised over the appellant by the Secretary of Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disregard this order, he had nothing to do but take the next or subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or proper officer could have been sent to arrest and bring him back, this could only be done by another order of the Secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty quite different from the first."

The rule applied in the past in the federal courts has been that the writ must run against some person within

the jurisdiction of the Court, since of course, it is against him that the writ must be effective. *Ex parte Endo*, 323 U. S. 283. Thus, a prisoner, where a jailer is present in the judicial district, cannot seek habeas corpus as against his superior outside the district. *Jones* v. *Biddle*, 131 F. 2d 853 (9th Cir.); *Sanders* v. *Bennett*, 148 F. 2d 19 (App. D. C.) Cf. *Burns* v. *Welch*, 159 F. 2d 29 (App. D. C.).[13] Conversely, it would seem that when the immediate jailer is not within the district, the writ must run against his superior. The only requirement of the statute is that "The writ or order to show cause shall be directed to the person having custody of the person detained."

Indeed, there are innumerable cases where the proper respondent is a superior of the immediate jailer even when the jailer is himself within the district. The Commanding Officer of an Induction Center, *United States ex rel. Alfieri* v. *Flint*, 54 F. Supp. 889 (D. Conn.), aff'd 142 F. 62 (2d Cir.); see *United States ex rel. Goodman* v. *Roberts*, 152 F. 2d 841 (2d Cir.), has been held a proper respondent, and the Supreme Court itself has entertained cases where the respondent (and petitioner for certiorari) was a Major General. *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304; *Eagles* v. *United States ex rel. Horowitz*, 329 U. S. 317. Sometimes, indeed, the real party in interest in a habeas corpus proceeding will not even be a superior of the jailer. A foreign government and its consul are the real parties in interest in a habeas corpus proceeding brought to avoid extradition, *Ornelas* v. *Ruiz*, 161 U. S. 502; *Clough* v. *Strakoach*, 109 F. 2d 330 (9th Cir.). To set aside a warrant of deportation not the warden of the penitentiary in which a prisoner is confined, but the Commissioner of Immigration is the proper party on habeas corpus proceedings. *Seechi* v. *United States Commissioner of Immigration*, 62 F. Supp. 594 (D. Penn.).

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[13] The two cases last cited were subsequently overruled in so far as they were in conflict with *Ahrens* v. *Clark*, 335 U. S. 188. See *McAffee* v. *Clemmer*, 171 F. 2d 131 (App. D. C.).

Thus it cannot be said that the rule is invariably that the writ of habeas corpus must be directed against the immediate jailer. As in all other phases of habeas corpus the courts have allowed elasticity so that substantial justice may be done. Cf. *Secretary of State for Home Affairs* v. *O'Brien* (1923), A. D. 603 (Home Secretary held to have de facto control of person illegally handed over to Irish Free State authorities). In the case of persons abroad, writs of habeas corpus can only be brought against those who in this country exercise control over the jailers. To deny them leave to direct the writs against such persons would be to reverse the entire history of the writ of habeas corpus by denying it upon a trifling technicality.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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